

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA

MISC. COMMERCIAL APPL. NO.18 OF 2019

FB GENERAL CONTRACTORS.....1st APPLICANT
FELIX RWEBANGIRA2nd APPLICANT

VERSUS

BANK OF BARODA TANZANIA LTD..... RESPONDENT

RULING

Date of the Last Order: 02/07/2020

Date of the Ruling: 03/07/2020

NANGELA, J.:

This is an application which was filed by the 1st and 2nd Applicants. The Application arises from *Commercial case No. 13 of 2019*, which was filed as a "Summary Suit" by the Respondent, on 26th November 2019. In essence, when a suit is filed as a "summary suit", the Defendant is barred from entering an appearance to fend for his rights, if any, unless he is granted, upon an application, permission to do so by the Court.

The application for which this ruling relates was brought by way of a Chamber Summons under *Order XXXV Rule 3 (1)* of the *Civil Procedure Code*, [Cap.33 R.E.2002]. The application is supported by two affidavits sworn by the 2nd Applicant. In this Application, the Applicants seek for the following orders of this Court:

1. THAT, this Court be pleased to grant leave to the Applicants to defend the suit.
2. Costs to follow events.

On 15th April 2020, the Respondent Bank filed its counter affidavit in which, apart from denying and disputing what was deposed by the Applicants in their supporting affidavits, the Respondent stated further that, the claims against the Applicants are clear and straight forward, as the Respondent seeks to recover the outstanding amount from a loan which was advanced to the Applicants and secured by a mortgage over *Plot.No.75 Nyakato Satellite Area, Mwanza Municipality*, registered under *CT No.2388* in the name of the 2nd Respondent and further personal guarantees from Felix Frederick Rwebangira, Anatory Mufundi Blandes and Bonanza Gareya as guarantors.

On the 2nd July 2020, the application was called on for its hearing. While Mr. Innocent Bernard represented the Applicants, Mr. Libenti Rwazo appeared for the Respondent Bank. The parties were invited to address the Court. Mr. Bernard rose to address the Court and prayed to adopt the contents of the Applicants' affidavits in support of the Chamber Application, as forming part of his submission.

In his submission, the learned counsel for the Applicants told this Court that, the 1st and 2nd Applicants are 1st and 2nd Defendants in *Commercial Case No.13 of 2019*. The case was filed by the Respondent as a *Summary Suit under Order XXXV of the CPC*.

Mr. Bernard went on to submit that, when the Applicants were served with the Plaint they were unable to file their defence given the nature of the law under which the Plaint was filed. He submitted, however, that, upon perusal of the Plaint the Applicants found out that there are issues worth being addressed by way of filing a defence, hence this application.

Mr. Bernard submitted further that, if one goes by the contents of the Applicants' affidavits, in particular, paragraph 5, 6, 7 and 8, it

will be found that the Applicants have indicated that there are triable issues in the *Commercial Case No.13 of 2019* (the main suit).

He submitted that, the triable issues as far as the affidavits are concerned, are that, the total amount claimed by the Respondent has been partly settled, as the Applicants have been servicing the loan before, and even after the filing of the main suit in this Court.

In view of the submission above, Mr. Bernard submitted that, the sum claimed from the Applicant as it appears in the Plaintiff, is not the actual amount to be claimed as of that date. He asserted, however, that, the Applicants can only clarify on that if they are given an opportunity to defend their case.

It was further submitted that, at para 7 of the 2nd Applicant's affidavit, there is a clear indication from receipts attached to form part of that affidavit, that, the amount loaned to the Applicants has been partly serviced and continues to be serviced.

To strengthen his submission, Mr. Bernard submitted that, even paragraphs 4, 5 and 6 of the Respondent's counter affidavit, do acknowledge that what the Applicants have asserted calls for proof. He submitted, therefore, that, that being the case, the only way to

prove the allegations is by way of granting the Applicants an opportunity to defend the main suit. With that submission, Mr. Beranard implored the Court to grant the prayers sought in the Chamber Summons.

For his part, Mr. Libenti who appeared for the Respondent, sought to adopt the counter affidavit filed by one Ms. Victoria Kavishe, the Mwanza Regional Manager of the Respondent Bank and proceeded to submit in reply to the submissions made by Mr. Bernard.

In his submission, Mr. Libenti told the Court that, it is a settled law under *Order XXXV rule 3 (1) of the Civil Procedure Code*, that, an Applicant seeking to challenge a suit filed as a Summary Suit, is required to prove, by way of an affidavit, that, the loan or a portion of it is indeed discharged or that, he never took the loan at all.

He submitted that, from the affidavit sworn by Mr. Rwebangira, it is not disputed that the applicants were granted a loan by the Respondent. He stated that, when the *Commercial Case No.13 of 2019* was instituted in this Court, the outstanding amount of the loan stood at TZS 83,760,890.54. And, Mr. Libenti added, the Plaintiff was filed on the 26th November 2019.

To counter the submission by the Applicants that they have been servicing the loan and continues to do so, Mr. Libenti submitted that, the receipts attached to the affidavit of the 2nd Applicant indicate that the amount paid was only TZS 100,000/= out of TZS 83,760,890.54. He submitted that, the deposit was done in December 2019, immediately after the Plaint was filed in Court and served upon the Applicants. It was his humble submission that, the Applicants' act of depositing TZS 100,000/= cannot in any way defeat the purpose of *Order XXXV rule 3 (1) of the CPC*.

Mr.Libenti conceded, however, that, there was a deposit of TZS 100,000/=after the Plaint was filed and the same were received by the Respondent Bank. He submitted, however, that, the Court may make an order that it be deducted from the outstanding amount and the Applicants be ordered to pay the remaining sum.

Besides, it was Mr.Libenti's submission with respect to paragraphs 5, 6 and 7 of the Affidavit of the 2nd Respondent that, the same should be countered with the reply in paragraph 4 and 5 of the Respondent's counter affidavit.

He insisted that, what the Applicants are required to show is whether they dispute the amount claimed or not. Failure to do so in their affidavit, then they have failed to present by way of their affidavits, a good defence, it was so submitted.

Mr. Libenti further insisted that, for a smooth running of businesses, leave to defend should not be granted and the Respondent's recovery measures should be left to take the course. For that reason, he prayed that the application be dismissed with costs to the Respondent.

In a brief rejoinder submission, Mr. Bernard submitted that, the Respondent's legal counsel concedes indeed that there is an amount which the Applicants have paid to the Respondent. Besides, the learned counsel for the Respondent spoke only about the amount which the Applicants deposited after the filing of the case, but said nothing about the monies deposited before and whether such earlier payments were deducted before the Respondent arrived at the amount claimed in the Plaint.

Mr. Bernard maintained that the Applicants' affidavit contain attached receipts indicating earlier payments made before the filing of

the *Commercial Case No.13 of 2019*. In view of this, Mr. Bernard rejoined that, the only way to prove that such monies were paid in servicing the loan, is by allowing the Applicants to file a defence.

He reiterated his prayers and submission in chief and maintained that, it is for such reasons that the application is in line with the claims of the Respondent and the need to ascertain how much is being claimed, this being an issue to be established in the main suit.

I have given due considerations to the rival submissions of the two learned counsel for the parties herein. To start with, *Order XXXV rule 3 (1) of the CPC. Cap.33 [R.E.2002]*, provides as here below:

- "3.-(1) The court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which-
- (a) disclose such facts as would make it incumbent on the holder leave to prove consideration, where the suit is, on a bill of exchange or promissory note; or
 - (b) disclose such facts as the court may deem sufficient to support the application.

As it may be noted in the above quoted provisions, the law has set out the conditions which must be met by an applicant who intends to be given an audience to defend a case filed under *Order XXXV rule 1 of the CPC*. His affidavit must disclose facts which indicate

that there is a *prima facie* defense. In other words, an applicant's affidavit is required to show that there are triable issues.

The above settled position of the law was reiterated by this Court, in the cases of *Nararisa Enterprises Company Limited and 3 Others v Diamond Trust Bank Tanzania Limited*; *Misc Commercial Case No. 202 of 2015* (unreported) and *Rafiki Eng.&Pump Services Ltd and Another v Mantrac Tanzania Ltd*, *Misc. Commercial Application No.17 of 2020*(Unreported).

In those decisions, the Court held that, before granting leave to defend a summary suit, the court should look upon the affidavit filed in support of the application, to see whether the deposed facts have demonstrated triable issues, fit to go to trial. This means that, the applicants are only required to show a fair and reasonable defence.

I have looked at the affidavits filed by the Applicants in support of their application. In principle they do not deny that they borrowed money from the Respondent Bank. What they hold as a contrary view is that, they have been servicing the loan and are still doing so even after the filing of the main case. Evidence to that effect

was attached to the affidavit of the 2nd Respondent, a fact which the Respondent's legal counsel has conceded.

The Applicants further hold that, since the amount they have so far paid is not stated, it is uncertain whether the outstanding balance which the Respondent is claiming, was arrived at after deducting what they have paid so far. In my view, these are triable issues worth noting.

In the case of *AHACO Oil Limited and Another v APEL Petroleum Ltd, Misc. Commercial Case No.5 of 2015, (Unreported)*, this Court, granted leave to applicants who, facing a similar situation, had sought to defend a summary suit.

In that case, Mansoor J, had the following to say:

"I have read the affidavit...The law requires that, the Applicant has to satisfy the conditions given in the law. The Applicants have to either deny that they have not taken the loan, or they have to show that they have paid either all or part of the loan. The Applicants in the present case admits (sic) to have taken the loan, and, also, have pleaded, in their affidavit that, they have paid a portion of the loan. The Applicants have demonstrated that they have an arguable defense entitling them to defend the summary suit...."

In view of the above cases and taking into account the disclosures made by the Applicants affidavits in support of their application, and being mindful of the fact the Applicants have been

servicing the loan as evidenced by the receipts attached to the affidavits filed in this Court, I am satisfied that the Applicants have an arguable defence entitling them to be granted leave to defend the summary suit.

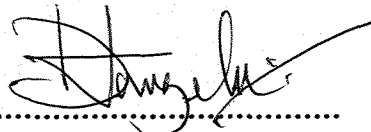
Besides, the fact that the Respondent has continued to receive from the Applicants deposits meant to service the loan makes it even more demanding that they be afforded an opportunity to fend for their rights as well.

In view of the above considerations, and since the Applicants have satisfied the requirements of *Order XXXV rule 3 (1) of the CPC*, leave is hereby granted to appear and defend the summary suit.

The Applicants are to file their Written Statement of Defence within 21 days from the date of this ruling.

In the upshot, the application is allowed. Costs will follow the cause in the main suit.

It is so ordered.



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DEO JOHN NANGELA
JUDGE,

High Court of Tanzania (Commercial Division)

03 / 07 / 2020

Ruling delivered on this 03rd day of July 2020, in the presence of the Mr. Felix Rwebangira (2nd Applicant) and Mr. Libenti Rwazo, Advocate for the Respondent.



DEO JOHN NANGELA
JUDGE,

High Court of Tanzania (Commercial Division)
03/07/2020

